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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1478

ELLIPSE CORPORATION,

Petitioner,

vs.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Ellipse Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 21, 1979.

OPINION BELOW

The opinion of the Court of Appeals, designated by that Court to be unpublished and not to be cited, appears in the Appendix hereto (A1-7). The District Court's opinion, *Ellipse Corporation* v. *Ford Motor Company,* 461 F. Supp. 1354 (ND Ill. Nov. 8, 1978) appears in the Appendix hereto (A12-59), and the Final Judgment appears at A59-61.

The liability Judgment and opinions in this case, believed necessary for reference thereto under this Court's Rule 23.1(i), are also reproduced in the Appendix hereto. These include: Judgment (on issue of liability) of December 22, 1969 (A62-64), the District Court's Findings of Fact and Conclusions of Law on liability in *Ellipse Corporation* v. *Ford Motor Company* (DC ND Ill., Dec. 22, 1969) 312 F. Supp. 646 (A64-93), and the opinion by the Court of Appeals, affirming in part and reversing in part, 452 F. 2d 163 (7th Cir. 1971), *cert. denied* 406 U. S. 948 (1972) appears at A94-107.

Another opinion, believed a necessary reference under this Court's Rule 23.1(i), involving both parties hereto, postured differently, appears in a companion case of *TRW, Inc.* v. *Ellipse Corporation and Ford Motor Company,* 177 USPQ 681 (ND Ill. 1973), affirmed 495 F. 2d 314 (7th Cir. 1974). The District Court's opinion in the *TRW* case is reproduced in the Appendix hereto (A108-112).

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on December 21, 1979. (A8-9).

A letter from the President of Ellipse Corporation to the Court of Appeals, timely received by said Court on January 4, 1980 within the 14-day time period provided by Rule 30, F. R. App. P., was treated by the Court of Appeals as a Petition for Rehearing that was denied on January 18, 1980. (A10-11).

This petition for certiorari is filed timely within 90 days of December 21, 1979. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under the rule of "law of the case", the Court of Appeals below erred by considering Ford's infringement, that

was subject to an award of damages under 35 U. S. C. § 284, to be only a part of Ford's power-steering pump, contrary to liability Conclusion 3 and to the liability Judgment, and contrary to Judge Perry's Accounting Finding 24 that was affirmed by the Court of Appeals?

2. Whether, under the rule of "law of the case", the courts below erred by failing to determine and award interest as provided for under 35 U. S. C. § 284, and from the dates when the damages accrued as called for by liability Conclusion 5 and by express terms of the liability Judgment?

3. Whether, under the rule of "law of the case", or under this Court's interpretation in *Wine Ry. Appliance Co.* v. *Enterprise Ry. Equip. Co.,* 297 U. S. 387 (1936) of a statutory damage limitation provision similar to the one enacted in 35 U. S. C. § 287, the courts below erred by failing to hold that Ford was liable for patent infringement during the period between August, 1964 and August 2, 1966?

4. Whether, the statutory construction applied to 35 U. S. C. § 284 by the court below, in determining "reasonable royalty" under the willing buyer/willing seller rule, functioned to introduce against the non-manufacturing patent owner, Ellipse, an irrational discrimination not based upon statutory authority, thereby denying Ellipse equal protection of law and resulting in deprivation of property without due process, in violation of Amendment 5 of the Constitution?

5. Whether, acts by the District Court below, including the Court assuming the right to decide the contested accounting issues without benefit of a report from the Special Master who observed demeanor and heard oral testimony of witnesses on contested issues, operated to deny due process or a proper hearing to Ellipse under Supreme Court authority, resulting in direct conflict with the authority of *Smith* v. *Dental Products Co.,* 168 F. 2d 516 (7th Cir. 1948).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 35:

§ 284. Damages.

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.

§ 287. Limitation on damages; marking and notice

Patentees, and persons making or selling any patented article for or under them, may give notice to the public that the same is patented, either by fixing thereon the word "patent" or the abbreviation "pat.", together with the number of the patent, or when, from the character of the article, this can not be done, by fixing to it, or to the package wherein one or more of them is contained, a label containing a like notice. In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice.

STATEMENT OF THE CASE

The dispute in this case relates to damages under 35 U. S. C. § 284 for infringement of a patent. Exclusive jurisdiction of a civil action arising under an Act of Congress relating to patents is laid in the district court. 28 U. S. C. § 1338(a).

The petitioner, Ellipse, owner of the patent in suit, 2,628,568, had filed suit on August 2, 1966 in the District Court in Chicago, seeking damages under 35 U. S. C. § 284 for patent infringement.

The District Court's decision and Judgment, entered December 22, 1969, determined *inter alia,* Ford's liability for patent infringement of Claim 3 of Ellipse's patent except for future determination, through an accounting of the final amount of the money judgment to be included in the decree.

A. The Liability Trial and Matters Decided Therein That Constitute the Law of the Case

Ford's liability for infringement of Claim 3 of U. S Patent 2,628,568 was determined in a prior trial, resulting in a Judgment (A62-64) and supportive Findings of Fact and Conclusions of Law (A64-93), which constitute the "law of the case". A portion of the "law of the case" is directly relevant to the Questions presented to this Court by this Petition.

The liability trial established: that the petitioner, Ellipse, owns the patent in suit (Finding 1, Conclusion 2; A64, 92)*; that the patent in suit discloses a "balanced slipper pump" (Findings 18 (par. 1), 22, 25 (pars. 1-3); A68, 71, 72); that Ford's power-steering pump is a balanced slipper pump (Finding 28; A76); and that Ford's power-steering pump embodies Claim 3, and infringes the patent in suit (Findings 29 and 31, Conclusion 3, and Judgment (Par. No. 2); A77, 92, 63).

The liability trial established both what is, and what is not, a "patented article" as that term is used in 35 U. S. C. § 287. The

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* In conformity with abbreviations used by the District Court in its opinion in the accounting (A14, n. 2), "Finding" as used herein refers to a Finding of the court in the liability trial. Similarly, "Conclusion" and "Judgment" when used herein refer to those matters entered in the liability trial.

The terms "Accounting Finding" and "Accounting Conclusion" will be used hereinafter to refer to those matters entered by the court in the accounting trial, which is the case before this court on this Petition.

patented article is a "balanced slipper pump" (Finding 25, par. 1; A72). An un-balanced slipper pump is not a patented article, as it is not embraced by Claim 3 or Claim 1 (Finding 25, pars. 3, 4; A72).

During 1946-1948, prior to issue of the patent in suit on February 17, 1953, Ellipse made and sold both balanced and un-balanced slipper pumps (Finding 6; A65). In 1948, Ellipse discontinued its manufacture of pumps (Findings 6, 7; A65-66). After the patent issued in 1953, Ellipse sold and delivered to Ford in 1957, two un-balanced slipper pumps (Finding 8; A66).

Ellipse caused a charge of patent infringement to be sent to Ford on December 21, 1962 (Finding 9; A66). Ford began manufacture and sale of its infringing power-steering pumps in 1964 (Finding 11; A66). Ford had knowledge late in 1962 that it planned to make and sell a balanced power-steering slipper pump (Finding 55, par. 2; A90). When Ford proceeded in 1964 to make and sell balanced, power-steering, slipper pumps it did so ". . . despite notice, and knowledge of the scope of the Rhine patent that should have alerted any reasonable and prudent businessman to take care not to infringe the patent rights of another" (Finding 57; A91), and Ford ". . . deliberately proceeded to make and sell the accused, balanced, power-steering, slipper pumps without regard to Ellipse's patent rights" (Finding 57; A91).

With respect to award of damages, the District Court concluded that "Ellipse is entitled to an accounting to determine its damage under 35 U. S. C. § 284, in an amount not less than a reasonable royalty . . . together with interest from the dates when damages accrued." (Conclusion 5; A92), and the Judgment directed the accounting to determine the amount of damages ". . . including interest from the dates when the damages accrued" (Judgment, Par. 5; A64).

The Judgment, as affirmed in part by the decision of the Court of Appeals at 452 F. 2d 163 (7th Cir. 1971), constituted ". . . a final judgment . . . for and in favor of the plaintiff herein and against defendant herein on the question of liability." (Judgment, Par. 3, A63). Said Judgment mandated an accounting to proceed before David J. Shipman as a Special Master, ". . . to take and hear testimony of the parties and to thereafter make a written report to the court on said accounting and a recommendation as to the final amount of the money judgment to be included in a decree herein." (Judgment, Par. 4; A63).

B. The Onset of the Accounting and TRW's Suit Respecting Same

After the Supreme Court denied Ford's petition for writ of certiorari that sought review of the decision on liability, an accounting proceeding commenced on June 22, 1972, pursuant to the amended Judgment that was mandated by the Court of Appeals for the 7th Circuit. The accounting proceeded before the Special Master that had been appointed (Judgment, Par. 4; A63).

On August 30, 1972 both parties hereto became involved as defendants in a related case entitled *TRW, Inc.* v. *Ellipse Corporation and Ford Motor Company*, Civil Action 72 C 2167. In the said case the plaintiff, TRW, sought to invalidate Claim 3 of Patent 2,628,568, the same patent claim that served as the basis for the decision of Ford's liability. TRW also sought to stay all further proceedings in the accounting between Ellipse and Ford. The case was assigned to Judge Perry, the same Judge who had decided Ford's liability for patent infringement.

Upon Ellipse's motion, TRW's action was dismissed. *TRW Inc.* v. *Ellipse Corporation, et al.*, 177 USPQ 681 (A108-112), affirmed 495 F. 2d 315 (7th Cir. 1974).

In his "Memorandum Opinion and Order" Judge Perry observed, with respect to the decision in *Ellipse* v. *Ford*, that

". . . there is no question that this judgment is *res judicata* as between Ford and Ellipse." (A111).

C. Ellipse's Proofs of "Reasonable Royalty" Under 35 U. S. C. § 284

Since Ellipse did not manufacture or sell patented articles, Ellipse elected to prove as its damages what would have been a "reasonable royalty", relying upon *Zegers* v. *Zegers, Inc.*, 458 F. 2d 726 (7th Cir. 1972), *cert. den.* 409 U. S. 878 (1972) and *Georgia-Pacific Corp.* v. *United States Plywood Corp.*, 446 F. 2d 295 (2nd Cir. 1971), *cert. den.* 404 U. S. 870 (1971).

Zegers, supra, held at p. 730, that consistent with this Court's views in ARO II[1]; "deprivation of royalty income which a patentee is entitled to receive from one who practices his invention constitutes a form of damages compensable under § 284 of the Patent Code."

Zegers, supra, also had held that "in some situations the infringer's profits may constitute evidence tending to prove the amount of plaintiff's damages . . . or be a factor in the calculation of a reasonable royalty." (Citing as authority *Georgia-Pacific, supra,* which used the infringer's profits from the infringement to calculate a reasonable royalty). *Zegers, supra,* at p. 728, n. 8, harmonized its ruling with *ARO II, supra,* by holding: "[P]ermitting evidence of profits to be admitted to show what a willing purchaser of a license might be expected to pay as a royalty is quite different from using profits as the measure of damages."

Zegers, supra, further states, in effect, at p. 730 that "reasonable royalty" may be used to establish the measure of damages for all patent holders seeking award under § 284, such as when proofs of lost sales [by a manufacturing patent owner] are inadequate or if the patentee does not himself sell the patented product.

1. *Aro Manufacturing Co., Inc. et al.* v. *The Convertible Top Replacement Co., Inc.* (ARO II), 377 U. S. 476 (1964).

Based upon the foregoing law, Ellipse proceeded with its proofs before the Special Master by introducing: (a) oral testimony of Ford's employee, Mr. Alan Roberts, who testified concerning Ford's Columnar Statement of Account and documentary support therefor; (b) oral testimony of Ford's employee, James Schairbaum, who produced Ford's Annual Price Studies of Revenues, Costs and Profits by Product Lines prepared for the Model Years 1965-1970, in evidence as PAX-2 through PAX-7, and who explained how amounts listed in said Studies were used to determine profits, revenue and costs for each power-steering option sold by Ford that included an infringing pump; (c) oral testimony of expert accounting witness, Weinstein, who explained further the background, meaning and usage of reports such as Ford's Annual Price Studies (PAX-2 through PAX-7), (d) oral testimony of expert accountant Hirsch, who calculated the revenue for the infringing pumps based upon sales volume in each Model Year, the profit to Ford based on sales of infringing pumps, and the amount of "excess" that was available to a "willing buyer" to be paid out after first insuring that the "willing buyer", Ford, had recovered its cost and its usual profit calculated from Ford's Annual Statement; and (e) oral testimony of patent experts, Snyder and Osann, who testified, based upon Hirsch's testimony, as to the amounts that would, in their opinions, constitute a "reasonable royalty" based upon use of the negotiation formula from *Georgia-Pacific, supra.*

The calculations prepared by Ellipse pursuant to the *Georgia-Pacific* formula[2] and testified to by witness Hirsch, were con-

2. The negotiation formula under the wiling buyer/willing seller concept, which was expressed in *Georgia-Pacific* for determining the "reasonable royalty" that an infringer "would have been willing to pay", is stated in *Tektronix, Inc.* v. *The United States et al.*, 552 F. 2d 343 (U. S. Ct. Clms. 1977) at p. 349, col. 2, as follows:

> ". . . start with the infringer's selling price, deduct its costs in order to find its gross profit, then allocate to the infringer its normal profit, and end up with the residual share of the gross profit which can be assigned to the patentee as its royalty."

firmed by oral testimony of Ford's accounting witness, Soper, to have been "correctly done". Soper further testified that Ford created the "net revenue" amounts in the PAX-108 portion of Ford's Amended Statement of Account by derivation, and that assuming that PAX-108 could not be proved up, and if one wanted to determine revenue for the infringing power-steering pump sold as part of an option, ". . . cost apportioning is an acceptable method for doing that type of thing".

Based upon the evidence and testimony presented before the Special Master, and using the negotiation formula of *Georgia-Pacific, supra,* Ellipse claimed that the average "reasonable royalty" that Ford could pay, as a "willing buyer", based upon Ford's revenue received from Ford's sale of infringing "option" pumps, would be in an amount of $5.79 per "option" pump. Since the Stipulation, PAX-107, provided that "reasonable royalty" shall be first determined in connection with "option" pumps, and then applied, if feasible and equitable, to the other infringing pump units, Ellipse's proofs were useable to determine the entirety of Ellipse's claim for damages ". . . in no event less than a reasonable royalty", as provided for under 35 U. S. C. § 284.

D. The Termination of the Accounting Proceeding Before the Special Master

On May 2, 1978, while the Special Master was considering the admissibility of certain exhibits tendered by Ford and contested by Ellipse, the district court entered an Order that directed the Special Master "to admit, without any further foundation, all exhibits submitted by defendant's counsel."

There is nothing in the Record which discloses how it was that Judge Perry knew that the Special Master was then considering the admissibility of defendant's contested exhibits. There also is nothing in the Record that discloses the basis considered by Judge Perry for ordering admissibility of the contested exhibits that he ordered be admitted in evidence without further foundation.

In the same Order of May 2, 1978, the District Court Judge modified the original Order of reference, and at the same time relieved the Special Master of further duties except for those directed by the Judge in his Order of May 2. A portion of the May 2 Order required the Special Master to file with the court by July 15, 1978 a condensed memorandum setting forth a summary of the Special Master's views of the evidence and the law in the case. In a later Order of May 19, 1978, the requirement that the Special Master file a memorandum was waived.

Thereafter, Judge Perry undertook to determine and dispose of all issues involved in the accounting hearing.

REASONS FOR GRANTING THE WRIT

A. The "Law Of The Case" Reason

Of the five Questions Presented, Nos. 1-3 have a common thread, of lower court defiance of "law of the case" rule, that results in a direct conflict with this Court's ruling in *Re C & A Potts & Co.,* 166 U. S. 263 (1897).

Potts, supra, was a patent case wherein this Court stated the general rule for "law of the case" as follows:

> "When a case has been once decided . . . on appeal, and remanded . . . , whatever was before the court and disposed of by its decree is considered as finally settled." (p. 265).

To the same effect see 1 A. L. R. 725.

In this case, the prior judgment in *Ellipse Corporation* v. *Ford Motor Company,* 312 F. Supp. 646, affirmed in part and reversed in part at 452 F. 2d 163, was on the merits and finally decided certain questions that were re-raised below and decided differently. These certain questions that were decided on the merits were: (1) What was the infringement?; (2) Should interest be awarded from dates when damages accrued, in connection with damages that remained to be determined in an ac-

counting hearing?; and (3) Had Ford been notified of infringement and continued to infringe thereafter?

There can be no doubt that each of the foregoing issues was intended to be, and was, decided by the District Court in 312 F. Supp. 646.

Thus, on the question of "What is the infringement?", Conclusion 3 (A92), supported by Findings 29 and 31 (A77), holds that the infringement it ". . . Ford's balanced, power-steering, slipper pump when sold in automobiles as original equipment or as replacement parts", and Par. 2 of the Judgment rules that the infringement is by ". . . defendant's manufacture, use and sale of the form of slipper-type pump used and sold by defendant as a power-steering pump." (A63).

On the issue of award of interest, Conclusion 5 is specific that "Ellipse is entitled to an accounting . . . together with interest from the dates when damages accrued." (A92), and Par. 5 of the Judgment decrees that an accounting proceed to determine the amount of damages ". . . including interest from the dates when the damages accrued . . ." (A64).

On the issue of "notice" of infringement, Finding 9 points to a ". . . charge of infringement . . . sent to Ford on December 21, 1962" (A66) and Finding 57 points out ". . . despite notice . . . Ford deliberately proceeded to make and sell the accused, balanced, power-steering, slipper pumps without regard to Ellipse's patent rights." (A91).

This Court's statement of the rule of law in *Potts, supra,* had, in the appeal below, been called to the attention of the Seventh Circuit Court in Ellipse's Main Brief at pages 17, 49 and 50, and in Ellipse's Reply Brief at page 41. The rule of law set out at 1 A. L. R. 725 was called to the attention of the Court of Appeals in Ellipse's Reply Brief at page 42. The unpublished Order by the Court of Appeals (A2-7) never refers to the legal authorities of *Potts, supra,* or 1 A. L. R. 725 relied upon by Ellipse.

As pointed out with specificity below, the recent unpublished Order (A2-7) of the Court of Appeals either ignored matters that had been earlier concluded by the Findings, Conclusions and Judgment on the merits, or purported to make factual statements that are directly contrary to matters that had been decided and disposed of by the Judgment on the merits. As such, said recent unpublished Order by the Court of Appeals is in direct conflict with the earlier Judgment. The new Order by the Court of Appeals is also in direct conflict with this Court's ruling in *Potts, supra.* Wherefore, a wire of certiorari should be granted to permit this court to correct the errors of law that arose from the lower court's defiance of the rule of "law of the case" that specifically appears in the Court of Appeals' opinion below (A2-7).

1. The Court of Appeals' Determination as to "What Was the Infringement?"

With respect to the issue of "What was the infringement?", the Court of Appeals makes the following statements:

> "This appeal and cross appeal are from an accounting of damages by reason of the *infringement by* the defendant Ford Motor Company *of Claim 3* of patent No. 2,628,568, *the pumping element of a high pressure pump* for fluids used in the power steering element of defendant's automobiles." (A2, par. 1) (Emphasis added)
>
> and
>
> "The district court considered . . . that *the pumping element of the defendant's pump* (*the only portion covered by the Rhine patent*) cost about $2.50; . . ." (A5, par. 2)

The foregoing statements by the Court of Appeals makes it appear that the infringement of the patent was by only a portion of the power-steering pump. But those statements are clearly contrary to the "law of the case" expressed in the liability Findings, Conclusions, and Judgment which make it clear that the infringement is by a pump, specifically a "power-steering pump". Furthermore, Accounting Finding 24 (A40-44) of Judge Perry's

Opinion, which was authored by Judge Perry as contrasted to most of the other Findings and Conclusions which Judge Perry copied substantially verbatim from text proposed by Ford's counsel, makes it clear that in Judge Perry's view the infringement was "the F-T pump".

One evident result from the failure to adhere to the "law of the case" as appears from the Opinion of the Court of Appeals is the suggested inference that because the alleged patented element cost only $2.50, the District Court could have been correct in rejecting Ellipse's claim for "reasonable royalty" at an average rate of $5.79 per pump that was based upon the revenue that Ford received from its highly profitable sale of the infringing F-T pumps that Ford acquired at a cost of between $9.84 and $10.48 per unit, as reported by Judge Perry in Finding 25(d) (A45), and for which Ford thereafter received Revenue of between $14.63 and $18.67, upon sale of its separately-priced, power-steering "options" as determined by Ellipse and presented to the Special Master in PAX-59.

Another evident benefit probably intended by the Court of Appeals, from the combination of its statements as to what the patent covered, coupled with the designation that its Order be "Unpublished" and "not cited", is avoidance of an evident, open, and direct conflict that would appear between the Court of Appeals Opinion (A2-7) and Finding 24 (A40-44) of Judge Perry's Opinion which the Court of Appeals sustained. In other words, the Court of Appeals intended to sustain Judge Perry based upon its newly stated view of the facts, but it also wanted to avoid embarassment if its view of the facts could be shown to be erroneous, as indeed is the case.

It should be observed that Ellipse specifically complained at p. 53 of its Reply Brief to the Court of Appeals, of an error by the District Court in asserting that claim 3 of the patent covered only a pumping element and not the pump. Ellipse further points out that the Court of Appeals had already concluded, in its Opinion in 1971 on the merits, as follows: "We conclude that

the district court did not err in determining that Ford's pump infringed claim 3 of the Rhine patent." (A105). But the Court of Appeals apparently never bothered to look at what it had earlier said.

As noted above, the Court of Appeals has effectively held in its present Order (A2-7) that the infringement was only a portion of Ford's power-steering pump. However, affirmed Accounting Finding 24 of Judge Perry's Opinion (A40-44) makes it abundantly and absolutely clear that the infringement was the F-T pump. In one very revealing section of Accounting Finding 24, Judge Perry states:

> ". . . As this court found upon the liability trial (Finding 56), Ford believed that the balanced slipper pump it proposed to make and sell was superior to existing pumps and that it included what it proclaimed to be new and useful concepts. (PAX-135, p. 1628). TRW subsequently patented devices that embodied Rhine's development of a balanced slipper pump and Ford sought out and obtained rights under such subsequent patents by becoming licensed thereunder. (Finding 50; PAX-135, p. 1625)." (A41-42)

Thus, the Court of Appeals, by asserting that the infringement in the case was only a part of Ford's power-steering pump, ends up in direct conflict both with what had been earlier decided in the opinion on liability, and in an internal conflict with its affirmance of Judge Perry's Accounting Finding 24, in violation of the "law of the case" rule, and in direct and open conflict with this Court's rulings in *Potts, supra.* Certiorari should be granted to correct this manifest error.

2. The Court of Appeals' View of the Question of "Interest", When an Award of Interest Is Provided for by the Terms of 35 U. S. C. § 284, Ignores the "Law Of The Case" Established by the Liability Judgment.

As noted in the Statement Of The Case, *supra,* the liability Judgment directed the accounting to determine damages and also ". . . interest from the dates when the damages accrued" (Judgment, Par. 5; A64).

Re C. & A. Potts Co., 166 U. S. 263 (1897) establishes that once a case is decided and remanded, a lower court is bound by the decree as the law of the case, and the lower courts must carry the decree into execution according to the mandate.

Ford did not appeal from the portion of the liability Judgment that ordered award of ". . . interest from the dates when the damages accrued." After affirmance by the Court of Appeals, this aspect of the Judgment then became a mandate on the District Court. And even if the prior judgment was wrong, since it is unreversed it is as effective as a judgment which is right. *Thornton* v. *Carter*, 109 F. 2d 316, 320 (8th Cir., 1940). The final judgment on the merits concludes the parties as to all issues which were or could have been decided. *Thornton, supra.*

An award of interest is expressly permitted by the first paragraph of 35 U. S. C. § 284. Interest has been awarded in patent infringement cases from dates prior to entry of judgment. *Georgia Pacific, supra*, 446 F. 2d 295 (2nd Cir. 1971), *cert. den.* 404 U. S. 870 (1971); *Pitcairn* v. *U. S.*, 547 F. 2d 1106 (Ct. Clms. 1976); *Tektronix, Inc.* v. *U. S.*, 552 F. 2d 1106 (Ct. Clms. 1977). In *Pitcairn* and *Tektronix*, interest was awarded annually from dates when damages accrued.

In this case, both the District Court and the Court of Appeals defied the decree and refused to award interest from the dates when damages accrued. The District Court asserted that interest "should be awarded only for the period following entry of the judgment" (Accounting Finding 33, Par. 2, (A54); Conclusion 12, (A58)). However, such rulings could not properly be made by the District Court, both because of the finality of the liability Judgment and because of the rule of law expressed by *Potts, supra.*

Although Ellipse's briefs called attention of the Court of Appeals to the authorities of *Potts, Thornton, Georgia-Pacific, Pitcairn,* and *Tektronix, supra,* in connection with the "interest" issue, the Court of Appeals ignored those authorities, and stated: "This circuit assesses interest only from the date damages are

liquidated, absent exceptional circumstances." (A6, par. 2). But that position fails to take into account the finality of the liability judgment and the compelling authority of *Potts, supra.*

Assuming that the Court of Appeals was suggesting error in the liability Judgment which had become "final" and constituted a mandate, there then exists a direct conflict between the Court of Appeals and *Thornton, supra* (8th Cir. 1940), because *Thornton* holds that even if the prior judgment is wrong, but unreversed, it is as effective as a judgment which is right. This conflict can only be resolved by this Court.

Assuming that the Court of Appeals is suggesting that the policy position of the Seventh Circuit overrides its previous unreversed judgment, there still exists direct conflict between the instant case and both the Eighth Circuit's decision in *Thornton, supra,* and this Court's expression of the rule of "law of the case" in *Potts, supra.* In either event, the conflict should be resolved, because a substantial money award is involved, whether the "reasonable royalty" be the $5.79 per pump claimed by Ellipse, or the 10¢ per pump awarded by Judge Perry.

B. The Decisions by the District Court and Court of Appeals Herein Are in Direct Conflict with the Supreme Court's Decision in Wine Ry., 297 U. S. 383 (1936).

The Court of Appeals below ruled that "In view of 35 U. S. C. § 287 and the findings, the court was correct in beginning the royalty computation with the first notice, that is, filing the lawsuit." (A3-4). However, that statement by the Court of Appeals fails to consider the applicability, in this case, of the exception to the thrust of § 287 provided by the Supreme Court decision in *Wine Ry. Appliance Co.* v. *Enterprise Ry. Eqt. Co.*, 297 U. S. 383 (1936).

The District Court had considered *Wine Ry., supra,* in its Finding 6 (A17-19), but rejected *Wine Ry.* as "not controlling here", because Ellipse had marketed two pumps and Ellipse

"has presented no evidence that it marked them in accordance with the statute." (A18).

In *Wine Ry.*, the Supreme Court ruled that there exists an exception to the damage limitation statute that exists when a patent owner does not manufacture or sell the "patented article" which is the subject of the damage limitation statute. The damage limitation statute that was ruled upon by the Supreme Court was the predecessor of the present damage limitation statute, 35 U. S. C. § 287.

Ellipse now points out that the Court of Appeals below totally failed to discuss *Wine Ry.* and the facts applicable to the exception provided by *Wine Ry.* Ellipse further asserts that if the Court of Appeals had considered *Wine Ry.* and the relevant facts, it would have concluded that the District Court's ruling on *Wine Ry.* was clearly erroneous, requiring reversal.

In its appeal, Ellipse had pointed out: that the patent in suit covers only a "balance slipper pump"; that the two pumps that were sold in 1956-7 after issue the of the patent in 1953 were un-balanced pumps, and therefore were not "patented articles" which is the specific subject of 35 U. S. C. § 287; and, therefore, *Wine Ry., supra,* is controlling on the issue of whether § 287 operates to limit Ellipse's recovery. But the Court of Appeals never dealt with any of these issues.

As pointed out in the "Statement Of The Case", *supra,* liability Findings 7 and 8 establish as "law of the case" the fact that Ellipse did not make or sell any balance slipper pumps after 1948, or after the patent issued in 1953, so that under those facts, *Wine Ry., supra,* is clearly applicable to this case. Ford's reply brief in the Court of Appeals never referred to *Wine Ry.*, but argued that § 287 is explicit that damages may be recovered only from the date that suit is filed.

Ellipse's Reply Brief then drew attention of the Court of Appeals to the fact that five Supreme Court justices in the *ARO II* decision, 377 U. S. 476 (1964) subscribed to the

authority of *Wine Ry., supra.* Since a patentee may hardly be expected to mark on a "patented article" when he does not make or sell such an article, § 287 cannot be asserted against him under such facts. *ARO II, supra.*

The five Justices who held in *ARO II*, 377 U. S. 476, that the exception of *Wine Ry.*, was also applicable to § 287 include Harlan, Brennan, Stewart and Goldberg who had joined in sub-section (4) of Footnote 8, beginning at p. 488, and Justice White, who had joined the other four justices through his "Separate Opinion", 377 U. S. at 514, which states in part:

> "In any event, § 287, as my Brother Brennan says, is not applicable here under *Wine Ry. Appliance Co.* v. *Enterprise Ry. Equip. Co.*, 297 U. S. 387, . . . because the patentee has not manufactured the article and has had no opportunity to mark it in accordance with § 287."

Thus, with respect to the question of whether § 287 denies recovery of damages to a patent owner who does not make or sell a "patented article", which is the subject of § 287, the rule of law is that the exception expressed in *Wine Ry., supra,* is controlling on the applicability of § 287.

Since Finding 8 of the liability trial (A66) establishes that the two pumps sold were un-balanced, and since the "patented article" is a "balanced slipper pump" (Finding 25, par. 1; A72) and not an un-balanced slipper pump (Finding 25, pars. 3, 4; A72), it is clear that the District Court's reliance upon § 287 to deny recovery to Ellipse for infringing acts occurring prior to Ellipse's filing of suit on August 2, 1966 is in direct conflict with this Court's decision in *Wine Ry., supra.*

The proper construction of the Statute, 35 U. S. C. § 287, is important as reflected by this Court's rulings on the substance thereof in both *Wine Ry., supra,* and in *ARO II, supra.* Therefore, the conflict between the decision herein and this Court's ruling in *Wine Ry.* should be resolved.

C. The Statutory Construction by the Courts Below of 35 U. S. C. § 284 Introduced an Irrational Discrimination That Dénied Equal Protection of Law and Violated Amendment 5 of the Constitution.

This issue arises in the following manner. Ellipse used the same negotiating formula that had been employed in other patent infringement cases, namely *Georgia-Pacific, supra,* and *Tektronix, supra,* to calculate, pursuant to the willing-buyer/willing-seller rule, as reasonable royalty which Ellipse then claimed it was entitled to as an award of damages for patent infringement under the statutory provisions of 35 U. S. C. § 284.

In connection with use of the *Georgia-Pacific* negotiation formula, to determine reasonably royalty by calculation, the courts in both the *Georgia-Pacific* and *Tektronix* cases explained that use of the calculation involves a willing-buyer/willing-seller concept which establishes an amount that the patent infringer, as a willing-buyer, "would have been willing to pay as a royalty".

Determining what a willing-buyer, or infringer, specifically "would have been willing to pay as a royalty" is critical, because *all* case authorities prior to this case determine said amount to be the amount that should be awarded to the holder of the infringed patent as "reasonable royalty." In respect to the foregoing, the District Court below misconceived the proper utilization of the willing-buyer/willing-seller rule, believing that under that rule a Court was to determine, *inter alia,* ". . . (2) what would Ellipse, as a prospective willing seller of a license, be willing to accept" (A. 23, first full par.)

This misconception is believed to derive from an improperly abridged quotation from *Horvath* v. *McCord,* 100 F. 2d 326, 335 (6th Cir. 1938) employed by the District Court both in its Accounting Finding 7, par. 8 (A. 22-23) and its Accounting Conclusion 6 (A. 55-56). This abridged quotation from *Horvath*

omits an explicatory sentence that immediately follows the quoted matter cited by the District Court and which reads as follows:

> ". . . In other words, the sum allowed should be that amount which a person desiring to use a patented machine and sell its product at a reasonable profit would be willing to pay."

By omitting said explicatory sentencé from the quotation from *Horvath, supra,* the District Court was able to, and did, change the entire meaning and intent of the willing-buyer/willing-seller rule, leading the Court to adopt an erroneous construction of the willing-buyer/willing-seller rule that was ultimately applied in construing 35 U. S. C. § 284.

The foregoing egregious error was brought to the attention of the Court of Appeals by Ellipse's briefs, but to no avail.

Study of the calculations performed in the *Georgia-Pacific* and *Tektronix* cases discloses that the reasonable royalty calculated under the *Georgia-Pacific* negotiation formula can be determined by using financial information obtainable wholly from the infringer. No input from the patent owner was required, although input from the patent owner has been used where information from the infringer is unavailable.

When Ellipse proposed to use the *Georgia-Pacific* negotiation formula, and proceeded to use it in presenting its proof of its claim for damages, the calculation produced a very large claim for reasonable royalty, reported by the District Court to be in an amount of $55,476,843, without interest.

The District Court concluded that, as a matter of law, Ellipse was not entitled to employ the same negotiation formula used in *Georgia-Pacific* and *Tektronix*. Thus, the District Court in Conclusion of Law No. 9 states:

> "9. Profits have been considered a relevant factor in negotiations between a willing buyer and willing seller only where the patent holder has had an established practice of maintaining the patent monopoly to himself for

his own exploitation and profit. *See, e.g., Georgia-Pacific Corp.* v. *U. S. Plywood-Champion Papers, Inc.*, 446 F. 2d 295 (2d Cir.) *cert. denied*, 404 U. S. 870 (1971); *Tektronix, Inc.* v. *United States*, 552 F. 2d 343 (Ct. Cl. 1977). Those facts are not present here . . .".

By the foregoing Conclusion of Law, the District Court established a basis of discrimination within the class that encompasses all patent holders,, the discrimination being between the sub-group of patent holders (Group I) who "had an established practice of maintaining the patent monopoly to himself for his own exploitation and profit", and the sub-group of all other patent holders (Group II).

According to "Conclusion of Law 9" in this case, Group I patent holders automatically have the following rights: (1) to use the infringer's "profits" as a relevant factor in negotiations between a willing buyer and willing seller; (2) to use the simple calculation procedure of the negotiation formula used in the *Georgia-Pacific* and *Tektronix* cases; and (3) to enjoy the benefits of the *Georgia-Pacific* negotiation formula, which establishes as a matter of law under the willing-buyer/willing-seller concept that the amount determined by the *Georgia-Pacific* calculation constitutes the actual amount of a reasonable royalty that a patent infringer, as a willing buyer, "would have been willing to pay as a royalty".

On the other hand, according to "Conclusion of Law 9' Group II patent holders would not be automatically entitled to any of the three rights enjoyed by Group I patent holders as set out above.

Furthermore, a Group II patent holder's claim for damages could be attacked as constituting a "windfall", in the event the claim is large relative to the investment (See Accounting Finding 7, par. 5); and the effect of an award of damages on the infringer's stock holders could also be taken into account (See Accounting Finding 7, Par. 6).

Finally, while an award to a Group I patent holder would, as a matter of law, be at least the specific amount calculated by formula, the Group II patent holder could be relegated to accepting as a reasonable royalty, any amount which a Judge selected, or believed would have been accepted by the patent holder, even though a *Georgia-Pacific* calculation might show that the patent holder is entitled to claim a substantially greater amount.

It should not be necessary to belabor the obvious, namely that Accounting Conclusion No. 9, entered in this case, provides an interpretation of 35 U. S. C. § 284 that functions to introduce against a non-manufacturing patent owner, such as Ellipse, an irrational discrimination that is not suggested by any portion of the Patent Statute, 35 U. S. C. The discrimination creates two classes of patent holders, endowing non-patent substantive and procedural rights to one class and denying those same rights to the other class.

It is fundamental in U. S. law that any unfair or irrational discrimination, among persons of a class defined by statute, operates to deny equal protection of the laws to the persons discriminated against. Significantly, when a discrimination between patent holders was tendered to the Seventh Circuit Court of Appeals in *Zegers* v. *Zegers, Inc.*, 409 U. S. 878 (7th Cir. 1972), *cert. denied* 409 U. S. 878, suggesting that a holder of an infringed patent, that was not in position to make and sell the patented article, should be awarded only "nominal" damages, the Seventh Circuit Court (J. Stevens) rejected that suggestion and effectively ruled that all patent holders are at least entitled to the amount of reasonable royalties that they were deprived of by reason of the infringement.

The U. S. Constitution, Amendment 5, states "No person shall . . . be deprived of . . . property, without due process of law; . . ." This provision has been construed to prohibit the Federal Government from denying equal protection of the law

through classifications that are so discriminatory or unjustifiable as to constitute a denial of due process of law.

Examination of the patent statute, 35 U. S. C. fails to disclose any basis in law for the type of discrimination between patent holders as is implicit in Accounting Conclusion 9 in this case. Assuming, *arguendo*, that Conclusion of Law 9 constituted a possible legal interpretation of 35 U. S. C. § 284, it is clear that such an interpretation gives rise to a potential unconstitutional construction, because the discrimination could operate to deprive a patent holder that is discriminated against of equal protection of the laws, and could give rise to actual or potential deprivation of property and rights without due process, in contravention of Amendment 5 of the U. S. Constitution. Furthermore, it is an established principle of law that there is an obligation upon the Courts, in construing congressional enactments, to take care to interpret them so as to avoid a danger of unconstitutionality. *U. S. A.* v. *C. I. O.*, 335 U. S. 106, 120-121 (1948) and authorities cited therein. Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949) 10 ALR 2d 608, 615.

Finally, the results of the discrimination flowing from Conclusion of Law 9 adopted by the District Court are dramatically evident. The Court reports that Ellipse's claim for reasonable royalty, based upon Ellipse's reliance upon the *Georgia-Pacific* calculation, is $5.79 per "Option" pump or a total of $52,682,891 on 9,098,945 pump units (A20). But with the intervention of Conclusion of Law 9, the District Court determined that Ellipse is entitled to a reasonable royalty of 10 cents per pump (Accounting Conclusion 28; A49).

Since Ford's Amended Statement of Account reports Revenue of "option" pumps to be at an average of $16.41 per pump, the 10¢ "reasonable royalty" as a percent of Revenue is about only 0.6%. Royalty rate of 1% of revenue on sale of infringing products has been designated "nominal" in *Union Carbide* v. *Graver Tank*, 243 F. Supp. 358, 363, affirmed 345 F. 2d 409, 410-411 (7th Cir. 1975). Royalty rate of 2½% of gross sales price of the infringing product has been declared inadequate or "clearly erroneous". *Panduit Corp.* v. *Stahlin Bros.*, 575 F. 2d 1152 (6th Cir. 1978). An award of "nominal" damages has been forbidden as a matter of policy by this Court in *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co., et al.*, 235 U. S. 641 (1915). The award below of a reasonable royalty of about 0.6% of revenue from sale of infringements is in direct conflict with the policy authority of *Dowagiac, supra.*

D. The District Court's Denial of Due Process and a Proper Hearing by Vacating the Reference to the Special Master.

Par. 4 of the liability Judgment directed that the accounting for damages proceed before a Special Master, who was to take and hear testimony and "make a written report to the court on the accounting and a recommendation as to the final amount of the money judgment to be included in a decree . . ." (A63).

As pointed out in the Statement of the Case, *supra*, the accounting commenced before the Special Master on June 22, 1972. On May 2, 1978, the District Court directed the Special Master to admit, without any further foundation, all exhibits submitted by defendant's counsel. In the same Order, the District Court modified the order of reference and in effect relieved the Special Master of further duties, but required the Master to file by July 15, 1978, a condensed memorandum setting forth the Master's views of the evidence and the law in the case. By a later order of May 19, 1978, the requirement of the memorandum from the Master was waived, and the Judge took over the accounting to decide same on the cold record without having heard any witnesses or observed their demeanor.

In *Smith* v. *Dental Products, Inc. et al.*, 168 F. 2d 516 (7th Cir. 1978), when the District Court Judge took over and decided an accounting after the Master, before whom the witnesses appeared, had died, and before the Master could

make any finding or report, and where the evidence before the Master was controverted, the Seventh Circuit Court of Appeals reversed the judgment entered by the District Court Judge on the bases that: (a) "the reference [to the Master], so far as legal effect is concerned is a nullity" (168 F. 2d at 518); and (b) the Judge's entry of judgment, when he did not see the witnesses, operated to deprive the parties of "due process" and of a proper "hearing" (168 F. 2d at 518-519).

The Seventh Circuit Court of Appeals in *Smith, supra,* based its rationale on Supreme Court authority of *Ohio Bell Telephone* case, 301 U. S. 292 (1937); *Morgan* v. *United States,* 304 U. S. 1 (1937); and *Morgan* v. *United States,* 298 U. S. 468 (1936). The rationale of the Supreme Court cases is effectively that the one who hears the evidence should decide the case. Thus, in *Morgan, supra,* 298 U. S. 468, at 480, this Court said:

"There must be a full hearing. . . ."

* * * * *

"The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone . . . The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

The Seventh Circuit Court concluded:

"We think it was the duty of the District Court, in the absence of findings and report from the Master, in order to afford the parties a hearing within the recognized legal meaning of that word, to direct a trial *de novo* before another Master or before itself." 168 F. 2d at 519.

Whether a Master dies before reporting on the hearing held before him, as in *Smith, supra,* or whether the Master's reference is vacated before he has reported on the hearings before him, as in the instant case, the effect is identical. The legal effect of the reference to the Master becomes a nullity; and the

District Court's attempt to base its judgment on the record and transcript made before the Master operates to deprive the parties of procedural "due process" and of a "hearing within the recognized meaning of that word."

The Court of Appeals below in rejecting Ellipse's complaint about the procedure, said that plaintiff raised no issues which depend upon the credibility of witnesses. But that view is respectfully contested, as Ellipse's case was built largely on oral testimony, as appears from the Statement of the Case, *supra,* which states that critical witnesses were Ford employees Roberts, Schairbaum, and Soper, and Ellipse's experts, Weinstein, Hirsch, Snyder and Osann, and that the credibility of Ford's expert Weil was seriously challenged, as demonstrated by the Special Master's hesitation to admit exhibits into evidence until ordered to do so on May 2, 1978 by a Judge who had no knowledge of the contested documents being ruled upon.

Another ground for rejection of Ellipse's position asserted by the Court of Appeals was that plaintiff failed to object timely. But a study of *Smith, supra,* reflects that there was no objection to the procedure in that case until the case reached the Court of Appeals (see 168 F. 2d at 518, col. 1, 1st full paragraph).

Finally, the Court of Appeals below cites two authorities to support its rejection of Ellipse's appeal on this specific issue. However, those authorities are of dubious relevance. In *D. M. W. Contracting* v. *Stolz,* 158 F. 2d 405, 407 (D. C. Cir. 1946), *cert. denied* 330 U. S. 839 (1947), decided prior to *Smith, supra,* the Court did *not* consider the impact of the Supreme Court decisions cited in *Smith, supra.* Furthermore, in *D. M. W.* the Court was principally concerned with judicial economy, at p. 407, last paragraph. In the respect of reliance upon significant judicial authority, *Smith* is the decision having greater legal support for its views, as it is based on Supreme Court authority. *D. M. W.* can only be considered as possibly in conflict with *Smith, supra.*

In *W. R. B. Corp.* v. *Geer,* 313 F. 2d 750, 752-53 (5th Cir. 1963), *cert. denied,* 379 U. S. 841 (1964), the court recognized

possible conflict between *Smith, supra,* and *D. M. W. Contracting, supra,* but it made no effort to select one decision over the other and the Court's comments relating to that issue were strictly *dicta,* because the fact is that the lower court's decision in that case was reversed and remanded on the basis of another issue. Therefore, *W. R. B. Corp.* does not stand as authority denying the thrust of *Smith, supra,* and *Smith* remains the only relevant decision that is based upon Supreme Court authority.

Because of conflict between the instant case and *Smith, supra,* even though both decisions are from the same circuit, and because the issue is an important one that many courts may be called upon in the future to decide, because heavy calendar loads force Judges to look for help from other sources, including Masters, this Court is respectfully urged to grant certiorari to resolve this specific issue.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Seventh Circuit.

Respectfully submitted,

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